SIVAMURTHY MUNIANDY & ORS A

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

COURT OF APPEAL, PUTRAJAYA B
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: W-01(IM)-633-10-2011]
14 AUGUST 2012 C

CIVIL PROCEDURE: *Judgments and orders - Irregular judgment - Allegation of - Non-service of writ - Whether service of writ of summons effected on last known address - Whether service in accordance with O. 10 r. 1(1) Rules of the High Court 1980 - Whether judgment in default a regular judgment* D

PROVIDENT FUND: *Unremitted contribution - Claim against directors - Claim for outstanding EPF payment - Whether unremitted contribution recoverable from company and directors - Employees Provident Fund Act 1991, s. 46(1) - Interpretation of - Whether reflects legislative intent to provide right of recourse against errant directors - Whether non-obstante clause in ss. 46(1) and 65(1) Employees Provident Fund Act 1991 should be interpreted broadly to render the Limitation Act 1953 inapplicable* E F

A suit was instituted against the second, fourth and fifth appellants in their capacity as the former directors of the company known as Euro-Asian F & B Services (M) Sdn Bhd ('the company') which had been wound up. The subject matter of the claim was for outstanding EPF contribution/payment between December 1992 and August 1993 together with dividend and interest. Upon a certificate of non-appearance being recorded, judgment-in-default was entered against the appellants. The appellants' application to set aside the said judgment-in-default was dismissed by the High Court. Hence, this appeal. The issues that arose were (i) whether the judgment-in-default, by reason of the non-service of the writ, was irregularly obtained and hence should be set aside *ex debitio justitiae*; (ii) whether the *non obstante* clause appearing in ss. 46(1) and 65(1) of the Employees Provident Fund Act 1991 ('EPF Act 1991') should be interpreted broadly so as to render the Limitation Act 1953 inapplicable such that the unremitted contribution was recoverable from the company and its directors notwithstanding that the limitation period had set in. G H I

Held (dismissing appeal with costs; affirming decision of High Court)
Per Syed Ahmad Helmy JCA delivering the judgment of the court:

(1) The challenge by the appellants on the judgment-in-default being an irregular judgment was without merits. The judgment-in-default recorded herein was a regular judgment. The respondent had effected service of the writ summons on the last known address of the appellants. The service through AR registered post by the respondent was in accordance with the provision of O. 10 r. 1(1) of the Rules of the High Court 1980. There was no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post (*Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*). (paras 8 & 9)

(2) In construing the non-obstante terms 'notwithstanding anything to the contrary in any other written law' appearing in ss. 46(1) and 65(1) of the EPF Act 1991, it ought to be accorded a broad and liberal interpretation to achieve the purpose, function and objective of the EPF Act 1991. The claim herein against the former directors was an unequivocal cause of action created by s. 46(1) of the EPF Act 1991 for the purpose of enabling the EPF Board to go after directors or responsible individuals of errant companies or entities. The wording of s. 46(1) of the Act reflects the legislative intent to provide a right of recourse against errant directors jointly and severally of defaulting companies which in law such right of recourse was non-existent because of the corporate personality concept. (paras 17 & 18)

(3) There was no appealable error on the part of the decision of the High Court judge. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Satu guaman telah dimulakan terhadap perayu kedua, keempat dan kelima dalam kapasiti mereka sebagai bekas pengarah sebuah syarikat yang dikenali sebagai Euro-Asian F & B Services (M) Sdn Bhd ('syarikat') yang telah digulungkan. Hal perkara tuntutan itu adalah untuk sumbangan/bayaran KWSP yang masih terhutang antara Disember 1992 dan Ogos 1993 bersama-sama dengan dividen dan faedah. Sebaik sahaja sijil tidak menghadirkan diri

direkodkan, satu penghakiman ingkar telah dimasukkan terhadap perayu-perayu. Permohonan perayu-perayu untuk mengenepikan penghakiman ingkar tersebut telah ditolak Mahkamah Tinggi. Oleh itu, rayuan ini. Isu-isu yang timbul adalah (i) sama ada penghakiman ingkar, dengan alasan kegagalan penyerahan writ, telah diperolehi secara tidak wajar dan harus diketepikan *ex debitio justitiae*; (ii) sama ada klausa *non obstante* yang terdapat dalam ss. 46(1) dan 65(1) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP 1991') harus diberi tafsiran luas menyebabkan Akta Had Masa 1953 tidak digunapakai supaya sumbangan yang belum diagihkan boleh dituntut dari syarikat dan pengarah-pengarahnya walaupun tempoh had masa telah ditetapkan.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi)
Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Cabaran perayu-perayu bahawa penghakiman ingkar adalah penghakiman yang tidak teratur tidak bermerit. Penghakiman ingkar yang direkodkan adalah penghakiman yang teratur. Responden telah melaksanakan penyerahan saman writ itu di alamat terakhir perayu-perayu yang diketahui. Penyerahan yang dilakukan melalui pos berdaftar AR oleh responden adalah selaras dengan peruntukan A. 10 k. 1(1) Kaedah-kaedah Mahkamah Tinggi 1980. Tiada keperluan bagi responden untuk membuktikan penerimaan writ itu oleh orang yang dinamakan di dalam pos berdaftar AR. (*Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*).

(2) Dalam mentafsirkan terma-terma *non-obstante* 'notwithstanding anything to the contrary or in any other written' yang terdapat di dalam ss. 46(1) dan 65(1) Akta KWSP 1991, ia sepatutnya diberikan tafsiran yang luas dan liberal untuk mencapai tujuan, fungsi dan objektif Akta KWSP 1991. Tuntutan di sini terhadap bekas pengarah-pengarah adalah tindakan kausa yang jelas disediakan oleh s. 46(1) Akta KWSP 1991 bagi tujuan membolehkan lembaga KWSP mendapatkan pengarah-pengarah atau individu-individu yang bertanggungjawab dari syarikat-syarikat atau entiti-entiti yang ingkar. Kata-kata s. 46(1) Akta mencerminkan niat perundangan menyediakan hak untuk bertindak terhadap pengarah-pengarah ingkar secara bersama dan berasingan dari syarikat-syarikat ingkar yang dari segi undang-undang hak untuk bertindak sebegitu tidak wujud disebabkan personaliti konsep korporat

(3) Tiada kekhilafan yang boleh dirayu terhadap keputusan Hakim Mahkamah Tinggi.

Case(s) referred to:

Lembaga Kumpulan Wang Simpanan Pekerja v. Carimonde Sdn Bhd & Ors [2011] 6 CLJ 451 HC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Goon Institution Sdn Bhd & Ors; Sateras Resources (M) Bhd (Third Party) [2011] 10 CLJ 403 HC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Manfined Smisek & Ors [2009] 1 LNS 1719 HC ***(refd)***

Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & Ors v. Employees Provident Fund Board (Civil Appeal No: 12-4-2006) (Unreported) ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Tuan Haji Ahmed Rahman v. Arab-Malaysia Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

EPF Act 1991, ss. 46(1), 65(1)
Interpretation Act 1948 & 1967, s. 17A
Rules of the High Court 1980, O. 10 r. 1(1)

For the respondent - N Ramesh; M/s Ramesh & Co
For the appellant - Afifi Ahmad (Fadzlin Yunos with him); M/s Azrul Afifi & Azuan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-21-51-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy JCA:

[1] The appellants herein are the second, fourth and fifth defendants in the court below and the appeal pertains to the dismissal of the appellant's application to set aside the judgment-in-default obtained against them on 1 July 2009.

[2] The suit was instituted against the appellants in their capacity as the former directors of the company known as Euro-Asian F&B Services (M) Sdn Bhd ("the company") which has since been wound-up.

[3] The subject matter of the claim is for outstanding EPF contribution/payment between December 1992 and August 1993 together with dividend and interest and upon a certificate of non-appearance being recorded judgment-in-default was entered against the appellants on 1 July 2009.

[4] The appellant's appeal was dismissed by the learned High Court judge. Hence this appeal.

[5] The issue for determination is the interpretation to be accorded to what is commonly referred to as a non obstante clause appearing in ss. 46(1) and 65(1) of the EPF Act 1991 - whether it should be interpreted broadly so as to render the Limitation Act 1953 inapplicable such that the unremitted contribution is recoverable from the company and its directors notwithstanding that the limitation period has set in or whether it should be construed narrowly as to render the applicability of the Limitation Act 1953 prohibiting the recovery of unremitted contributions which exceeded the limitation period.

[6] The principal contention of the appellants was that the phraseology "notwithstanding the provisions of any other written law" appearing in the non obstante cls. 46(1) and 65(1) of the EPF Act 1991 did not oust the applicability of the Limitation Act 1953.

[7] Before addressing the appellant's contention aforesaid I would deal with the complaint that the judgment-in-default, by reason of the non-service of the writ, was irregularly obtained and hence should be set aside *ex debitio justitiae*. The appellant's complaint is predicated by the AR cards which was returned by the post office without acknowledgment or signed by any recipient and does not bare the chop of the returning post office. The non-service of the writ and their absence of any knowledge of the proceedings was averred by the appellants in their supporting affidavits. In support of their complaint they referred to the Federal Court case of *Tuan Haji Ahmed Rahman v. Arab-Malaysia Finance Berhad* [1996] 1 CLJ 241 where it was held:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules, some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings nullity. The general rule is that when it is clearly demonstrated to the

A satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debitio justitiae*, that is to say irrespective of the merits and without terms.

B **[8]** The challenge by the appellants on the judgment-in-default being an irregular judgment as advanced by learned counsel is without merits. It is our considered view that the judgment-in-default recorded herein is a regular judgment. The respondent effected service of the writ of summons on the last known address of the appellants as discerned from their addresses found in Form C 49 filed with the Suruhanjaya Syarikat Malaysia. There is no evidence of any change of the appellant's addresses being brought to the attention of the respondent. The service through AR registered post by the respondent is in accordance with the provision of O. 10 r. 1(1) of the Rules of the High Court 1980.

D **[9]** There is no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post. The Court of Appeal in *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175 held:

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> There was no provision of law that the plaintiff must also prove that the person so named in the post had received the writ of summons and statement of claim. Once the writ of summons and statement of claim are sent by AR registered post, it is *prima facie* proof of service unless the defendant is able to rebut this. From
F the facts, that presumption was not rebutted.

[10] Similarly from the factual matrix the presumption of service herein was not rebutted. We may also add that there is no legal obligation imposed on the respondent to conduct a search at the G National Registration Department to ascertain the latest address of the appellants.

[11] Having disposed of the challenge as to the irregularity of the default judgment I shall now proceed to address the issue as to H the applicability of the Limitation Act 1953 in the light of the non-obstante clause of ss. 46(1) and 65(1) of the EPF Act 1991.

[12] In the interpretation of statutory provisions, of utmost importance is to ascertain the intention of the legislature in promulgating the statute. Upon discovery of the true intention of I parliament the court is entrusted with the duty of adopting an

approach that promotes the purpose or object underlying the statute or what is popularly known as the purposive approach. The Federal Court in *Palm Oils Research and Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd* [2004] 2 CLJ 265 sanctioned the purposive approach when it was opined:

> When constructing a taxing or other statute, the sole function of the court is to discover the true intention of parliament. In that process the court is under duty to adopt an approach that produces neither injustice nor absurdity ie, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein.

[13] The purposive approach in fact is a legally recognised rule of interpretation as mandated by the Interpretation Act 1948 and 1967. Section 17A whereof expressly provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

[14] Having the rule of construction at the forefront, the starting point is to inquire as to the objective of the EPF Act 1991. In this connection we adopt the views expressed by Low Hop Bing JCA in *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee* [2010] 5 CLJ 23 of the EPF Act 1991, being a piece of social legislation. At p. 29 thereof His Lordship stated:

> the EPF Act 1991 which is a piece of social, legislation wherein the underlying purpose or object is no doubt the promotion of the welfare of the members. In the context of beneficient social legislation, the provisions therein must receive a broad, liberal and functional or purposive interpretation - see *Golden Hope Plantations (Peninsular) Sdn Bhd (Ladang Sungei Senarut) v. Sarawathy Kathan* [2009] 3 CLJ 335 CA.

[15] We are not oblivious to the fact that there appears to be contrary decisions emanating from High Court judges. On the one hand there is the decision of Varghese George JC (as he then was) in *Lembaga Kumpulan Wang Simpanan Pekerja v. Carimonde Sdn Bhd & Ors* [2011] 6 CLJ 451 and decision of Lee Swee Seng JC in *Lembaga Kumpulan Wang Simpanan Pekerja v. Goon Institution Sdn Bhd & Ors; Sateras Resources (M) Bhd (Third Party)* [2011] 10 CLJ

A 403 which advocates the view that EPF Act 1991 did not oust the applicability of the Limitation Act 1953 - the rationale being the wording of the non-obstante terms in ss. 46(1) and 65(1) being generally worded did not refer to any particular provision or legislation with the consequent result that it only ousted provisions
B in any other written law that conflict or clash with the statutory objective of the Act. In essence where the non-obstante clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude *per se* all other legislation or provisions in force in other legislation.

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[16] On the other hand the following decision advocates the view excluding the applicability of the Limitation Act 1953 - decision of Hadhariah JC in the unreported case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Lim Kek Bee & Anor*; decision of Zabariah J in
D *Lembaga Kumpulan Wang Simpanan Pekerja v. Manfined Smisek & Ors* [2009] 1 LNS 1719 and the decision of Linton Albert J. in *Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & Ors v. Employees Provident Fund Board* in Civil Appeal No. 12-4-2006 (unreported).

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[17] In construing the non-obstante terms "notwithstanding anything to the contrary in any other written law" appearing in ss. 46(1) and 65(1) of the EPF Act 1991 we are of the considered view that it ought to be accorded a broad and liberal
F interpretation to achieve the purpose, function and objective of the EPF Act. A narrow approach as advocated in the cases of *Lembaga Wang Simpanan Pekerja v. Carrimonde Sdn Bhd & Ors (supra)* and *Lembaga Wang Simpanan Pekerja v. Goon Institution Sdn Bhd & Ors (supra)* would in the circumstances negate the cardinal
G purposive approach.

[18] The claim herein against the former directors is a unequivocal cause of action created by s. 46(1) of the EPF Act 1991 for the purpose of enabling the EPF Board to go after directors or responsible individuals of errant companies or entities. The
H wording of s. 46(1) of the Act reflects the legislative intent to provide a right of recourse against errant directors jointly and severally of defaulting companies which in law such right of recourse was non-existent because of the corporate personality concept.

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[19] In the circumstances, we find no appealable error on the part of the decision of the learned High Court judge. The appeal as accordingly dismissed with costs of RM10,000. Decision of the High Court affirmed.